

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA

HEATH ORAN DOOLEY,
Bar No. 014399,

Respondent.

File No. 05-1377, 05-1616, 05-1660, 06-0204, 05-2088

HEARING OFFICER REPORT

(Assigned to Hearing Officer 9J
Mark S. Sifferman)

PROCEDURAL HISTORY

The Complaint was filed in this matter on March 28, 2006 to which Respondent filed an Answer. An Amended Complaint was filed July 25, 2006 to which Respondent filed an Answer containing mostly general denials. A hearing was set for October 19, 2006. A settlement conference was held October 2, 2006. A complete settlement was not reached at that time. Prior to the October 19 evidentiary hearing, however, the State Bar and the Respondent submitted a Tender of Admissions and Agreement for Discipline by Counsel along with a Joint Memorandum in support. The evidentiary hearing was vacated.

FINDINGS OF FACT

Based on the Tender of Admissions and the record in this matter, the following facts are found to exist conditioned on the acceptance of the Tender of Admissions and Agreement for Discipline.

RESPONDENT'S BACKGROUND

1. Respondent was admitted to practice law in this State on January 12, 1993. He has remained an active Member of the Arizona Bar since then.

COUNT ONE (FILE NO. 05-1377)
(VRANDENBURG)

2. In approximately June 2004, Hellene Vrandenburg retained Respondent to represent her in a personal injury matter involving a "slip and fall" incident that took place at a Wal-Mart.

3. At the time that Respondent first consulted with Ms. Vrandenburg, Respondent encouraged her to sign up for a "service plan" provided by Legal Access Service, Inc.

4. The service plan provided for free initial consultations and discounted legal services.

5. Respondent is the President and CEO of Legal Access Service.

6. Ms. Vrandenburg agreed and paid \$288.00 to join the plan. Respondent then referred Ms. Vrandenburg's case to himself.

7. In approximately March 2005, Respondent prepared and filed a Complaint on Ms. Vrandenburg's behalf against Wal-Mart.

8. Ms. Vrandenburg subsequently made numerous telephone calls to Respondent regarding the status of her case.

9. Respondent consistently failed to respond to Ms. Vrandenburg's inquiries or otherwise communicate with her regarding the case.

10. On August 18, 2005, Respondent filed a motion to withdraw as counsel in the case at the request of the client, which motion was granted by the Court.

11. Respondent handled this matter on a contingency fee basis, so there is disgorgement of attorneys' fees issue presented. Furthermore, there is no evidence of any damage to the client.

12. On or about August 31, 2005, Respondent was sent a charging letter from the State Bar of Arizona.

13. Respondent initially requested, and was granted, an extension to respond to the allegation. Respondent, however, never responded.

14. Respondent failed to keep his client reasonably informed about the status of the matter and to promptly comply with reasonable requests for information; and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions.

15. Respondent failed to protect his client's interests upon termination of the representation.

16. Respondent failed to promptly respond to an inquiry and request for information from bar counsel.

17. Respondent engaged in conduct that was prejudicial to the administration of justice.

COUNT TWO (FILE NO. 05-1616)
(SNYDER)

18. In approximately November 2004, George and Sharon Snyder (hereinafter "the Snyders") retained Respondent to represent them in a medical malpractice case.

19. In approximately December 2004, Respondent prepared and filed a Complaint against various Defendants as part of the malpractice claim.

20. Between December 2004 and August 2005, Respondent failed to return numerous telephone calls and other inquiries from the Snyders regarding the status of the case.

21. On or about August 26, 2005, the Snyders were advised by the Court handling their medical malpractice case that Respondent had filed a motion to withdraw

as counsel on the case. The Snyders had not been advised by Respondent that he had moved to withdraw his counsel.

22. During the course of the litigation, Respondent failed to timely respond to a discovery request from opposing counsel, i.e., a request for admissions, which resulted in the Court dismissing two Defendants from the case. Respondent did not inform the Snyders of the dismissal or of his failure to respond to discovery.

23. Respondent also failed to participate in the preparation of a joint pre-hearing statement.

24. The Snyders retained new counsel in the case. This new counsel requested from Respondent the file relating to the lawsuit. Respondent failed to timely comply with this request. Replacement counsel obtained relevant documents relating to the litigation from other attorneys in the case at the cost of \$484.70.

25. If a hearing was held, Respondent would testify that he was unaware that new counsel was attempting to contact him and that the problem may have occurred as a result of his office closure.

26. Respondent failed to timely submit an accounting of cost monies to the Snyders, or to refund the \$4,286.94 of unused cost retainer.

27. There was no evidence presented of injury to the Snyders from Respondent's conduct, except for the copying charge incurred by substitute counsel and the failure to refund the unused retainer.

28. Respondent was sent a charging letter from the State Bar of Arizona on October 13, 2005. Respondent never has responded to this charging letter.

29. At the outset of the representation, Respondent sold to the Snyders a plan in his legal services club.

30. Respondent failed to act with reasonable diligence and promptness in representing his clients.

31. Respondent failed to keep his client reasonably informed about the status of the matter and to promptly comply with reasonable requests for information; and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation.

32. Respondent failed to take steps reasonably practical to protect his clients' interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled, and refunding any advanced payment of a fee that has not been earned, when Respondent withdrew from representation.

33. Respondent failed to make reasonable efforts to expedite litigation consistent with the interests of his client.

34. Respondent failed to promptly respond to an inquiry and request for information from the State Bar.

35. Respondent engaged in conduct that is prejudicial to the administration of justice.

COUNT THREE

36. In exchange for Respondent's Tender of Admissions as to other Counts of the Amended Complaint, the State Bar wishes to dismiss the allegations of Count Three. The State Bar believes that it may fail to prove the allegations of Count Three with clear and convincing evidence.

COUNT FOUR (FILE NO. 06-0204)
(KOHLER)

37. In February 2005, Mary Kohler retained Respondent to represent her in a dispute with the construction company that had built her condominium.

38. Prior to the representation by Respondent, Ms. Kohler had filed a Complaint with the Registrar of Contractors ("the Registrar") alleging that the Company failed to properly construct the condominium and obtained a favorable judgment.

39. The construction company sought relief from the Registrar's decision and appealed the decision in the Maricopa County Superior Court.

40. Ms. Kohler retained Respondent to represent her in the appeal and paid him a \$5,000.00 retainer for his services.

41. Over the next several months, Ms. Kohler made multiple unsuccessful attempts to contact Respondent regarding the status of the case.

42. In the meantime, Respondent petitioned the Court to withdraw from the case as counsel for Ms. Kohler. Respondent had not consulted with the client before moving to withdraw as counsel.

43. At the time of the motion, Respondent also moved to continue the hearing.

44. The Court granted Respondent's Petition to Withdraw, but denied the Request for a Continuance. Ms. Kohler, however, was not advised by Respondent of the Court's Order.

45. Respondent was sent a charging letter from the State Bar of Arizona on February 16, 2006. Respondent failed to respond.

46. Ms. Kohler has since retained new counsel in the case.

47. Respondent failed to refund the portion of the retainer for fees not earned in the case, equaling \$511.90. Ms. Kohler may dispute the fee charged by Respondent in

her matter. If requested, Respondent has agreed to participate in the State Bar's Fee Arbitration program as to Ms. Kohler.

48. Other than the failure to refund the undisputed amount of the unearned retainer, there is no evidence of any injury to the client.

49. Respondent failed to abide by his client's decisions concerning the objectives of representation, and to consult with his client as to the means by which they are to be pursued.

50. Respondent failed to keep his client reasonably informed about the status of the matter and to promptly comply with reasonable requests for information; and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

51. Respondent failed to take steps to the extent reasonably practical to protect the client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled, and refunding any advance payment of a fee that has not been earned, upon termination of representation.

52. Respondent failed to promptly respond to an inquiry and request for information from the State Bar.

COUNT FIVE (FILE NO. 05-2088)
BURG

53. In approximately November 2004, Robert Burg retained Respondent to represent him in a personal injury matter arising from an automobile accident.

54. Respondent did not timely comply with all discovery requests from opposing counsel.

55. Opposing counsel deposed Mr. Burg. If a hearing was held, Mr. Burg would testify that, prior to the deposition, Respondent advised him that in response to opposing counsel's questions, Mr. Burg's memory of the events at issue should be "bad" and not to worry about the answers. Respondent would testify that he provided standard advice to Mr. Burg that he should answer truthfully and not guess at answers. The State Bar does not contest Respondent's assertion.

56. After the deposition, Mr. Burg made multiple unsuccessful attempts to contact Respondent by telephone to obtain the status of the case. Mr. Burg has never heard from Respondent again.

57. The Superior Court record indicates that Respondent moved to withdraw from the case on approximately August 15, 2005. Respondent did not timely notify Mr. Burg of his intention to withdraw.

58. In approximately November 2005, Mr. Burg went to Respondent's office and found that the office was abandoned.

59. Respondent handled this matter on a contingency fee basis, so there is disgorgement of attorneys' fees issue presented. Furthermore, there is no evidence of any damage to the client.

60. On or about December 21, 2005, a charging letter was sent from the State Bar of Arizona to Respondent. Respondent failed to respond.

61. Respondent failed to act with reasonable diligence and promptness in representing his client.

62. Respondent failed to keep his client reasonably informed about the status of the matter and to promptly comply with the reasonable requests for information; and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

63. Respondent failed to protect his client's interest at the termination of the representation.

64. Respondent failed to make reasonable efforts to expedite litigation consistent with the interest of his.

65. Respondent failed to promptly respond to an inquiry and request for information from the State Bar of Arizona.

FACTS RELATING TO AGGRAVATION AND MITIGATION

66. The findings set forth above evidence a pattern of misconduct, which is an aggravating circumstance under ABA Standard 9.22(c).

67. The findings set forth above constitutes multiple offenses, which is an aggravating circumstance under ABA Standard 9.22(d).

68. Respondent obstructed the disciplinary proceeding by failing to respond to charging letters. Respondent failed to provide answers to discovery or provide a Rule 26.1 Disclosure Statement, resulting in an Order compelling compliance. Respondent, however, did participate actively in settlement negotiations, and showed a willingness to accept responsibility. Respondent's failure to earlier cooperate was due, in part, to the personal circumstances detailed below. While Respondent's conduct does constitute an aggravating circumstance under ABA Standard 9.22(e), Respondent's later cooperation in resolving this matter lessens the severity of this aggravating circumstance.

69. Respondent has been an attorney since 1993. His substantial experience in the practice of law constitutes an aggravating circumstance under ABA Standard 9.22(i).

70. Respondent has no prior disciplinary history, which constitutes a mitigating factor under ABA Standard 9.32(a).

71. There is no evidence of a dishonest or selfish motive on behalf of the Respondent, which is a mitigating factor under ABA Standard 9.32(b).

72. The misconduct in these cases occurred at a time when Respondent was suffering severe stress due to several major personal problems. Respondent has been the primary caretaker for his mother, who is elderly and suffering from dementia, and who resides with Respondent. At the same time, Respondent was undergoing extreme marital difficulties, and focused his energies on dealing with those difficulties. This constitutes a mitigating factor under ABA Standard 9.32(c).

CONCLUSIONS OF LAW

1. As to Count 1, Respondent conditionally admits that he violated ERs 1.4, 1.16(d), 8.1(b) and 8.4(d).
2. As to Count 2, Respondent conditionally admits that he violated ERs 1.3, 1.4, 1.16(d), 3.2, 8.1(b) and 8.4(d).
3. As to Count 4, Respondent conditionally admits that he violated ERs 1.2, 1.4, 1.16(d) and 8.1(b).
4. As to Count 5, Respondent conditionally admits that he violated ERs 1.3, 1.4, 1.16(d), 3.2 and 8.1(b).
5. The State Bar conditionally agrees to the dismissal of the alleged violations of ER 1.8(a) in Counts 1 and 2, the alleged violation of ER 1.3 in Count 1, the alleged violation of ER 1.2 in Count 5, and all the allegations in Count 3.

RESTITUTION

The following payments should be made as restitution:

- to George and Sharon Snyder (Count 2) the unused portion of the retainer in the amount of \$4,286.94 plus the copying expense of \$484.20.
- to Mary Kohler (Count 4) the unused portion of the retainer in the amount of \$511.90. If requested, Respondent will participate in the State Bar's Fee Arbitration program as to the reasonableness of the fees charged.

RECOMMENDATION

CONSIDERATION OF THE ABA STANDARDS

In determining the appropriate sanction, the American Bar Association's *Standards for Imposing Lawyer Sanctions* are considered. *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004). Those *Standards* counsel that, in determining the proper sanction, four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and/or mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); ABA Standard 3.0. Where there are multiple charges of misconduct, there should only be one sanction with the multiple instances of misconduct considered as aggravating factors. See *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992).

The duty violated by Respondent was one owed to the client. (ABA Standard 4.0). The applicable standard in this case is ABA Standard 4.4, Lack of Diligence. The relevant mental state is knowingly. ABA Standard 4.42 provides that suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in the pattern of neglect and causes injury or potential injury to a client.

The following aggravating factors are present:

- 9.22(c) pattern of misconduct
- 9.22(d) multiple offenses
- 9.22(e) obstruction of disciplinary proceeding
- 9.22(i) substantial experience in the law.

The following mitigating factors are present:

9.32(a) absence of a prior disciplinary record

9.32(c) personal or emotional problems

9.32(b) lack of dishonest or selfish motive.

PROPORTIONALITY ANALYSIS

The purpose of professional discipline is twofold: (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in similar misconduct. *In re Neville*, 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985); *In re Swartz*, 141 Ariz. 266, 277, 686 P.2d 1236, 1247 (1984). Disciplinary proceedings are not to punish the attorney. *In re Peasley*, 208 Ariz. 27, 39, 90 P.3d 764, 776 (2004); *In re Beren*, 178 Ariz. 400, 874 P.2d 320 (1994).

The discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). To have an effective system of professional sanctions, there must be internal consistency and it is therefore appropriate to examine sanctions imposed in cases that are factually similar: *In re Shannon*, 179 Ariz. 52 (1994); *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988).

In the Joint Memorandum in Support of Agreement for Discipline Consent filed by the State Bar and Respondent, the following cases were provided for guidance in the proportionality analysis: *Matter of Mendoza*, SB-03-0112-D (2003), *Matter of McGuire*, SB-99-0029-D (1999), *In re Feeley*, 168 Ariz. 436, 814 P.2d 777 (1991), *In re Anderson*, 163 Ariz. 362, 788 P.2d 95 (1990), and *In re Cassalia*, 173 Ariz. 372, 843 P.2d 654 (1992). Because of their age, this Hearing Officer does not believe the decisions in *Feeley*, *Anderson* or *Cassalia* are overly persuasive to ensure proportionality. The decision in *Mendoza and McGuire* involve suspensions lengthier than recommended here.

Those cases, however, involved additional factors, including harm to the clients, which justified longer suspensions.

I have reviewed more recent decisions of similar conduct, especially those involving agreed-upon sanctions. I believe that the following matters support the conclusion that the recommended discipline is within the appropriate range: *Cord* (SB-03-1743), *Bryn* (SB-03-2228), *Webber* (SB-02-1151), *Robinson* (SB-01-2144), *Mankowski* (SB-03-0310), *Gertell* (SB-02-0281), and *Counce* (SB-01-2359).

CONCLUSION

Upon consideration of the facts, application of the *Standards*; including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent which generally provides for the following:

1. Respondent shall be suspended for a period of six months.
2. Upon reinstatement, Respondent shall be placed on two years of probation under the following terms and conditions:
 - a. Respondent shall undergo an assessment in connection with the State Bar's Member Assistance Program (MAP) and any recommendations resulting from such assessment shall be incorporated in a probation contract, the terms of which are incorporated herein. The probation period would begin to run at the time of the reinstatement, and would conclude two years from the date that all parties have signed the probation contract. Respondent must contact the Director of the MAP program within thirty days of reinstatement to schedule the assessment. Should Respondent relocate out of state, Respondent still must undergo the initial assessment, and appropriate terms, if needed, will be developed to continue any requirements in the other state. Respondent, in

accordance with the terms of the contract, will continue to report compliance with any such terms to MAP.

b. Respondent must contact the Director of the State Bar's Law Office Management Assistance Program (LOMAP) within thirty days from the date of reinstatement. Respondent must submit to a LOMAP audit of his office's calendaring procedures and client communication. The Director of LOMAP will develop a probation contract, and its terms will be incorporated herein by reference. Should Respondent relocate out of state, Respondent will not be required to complete this term. However, should Respondent resume the practice of law in Arizona during the probationary period, Respondent must immediately contact the LOMAP Department and comply with this term.

c. Respondent must attend the State Bar's Ethics Enhancement Program during the probationary period.

d. Respondent must refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other Rules of the Supreme Court of Arizona.

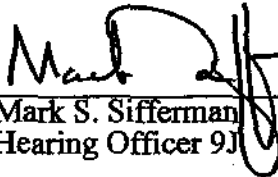
3. In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar counsel may file a notice of non-compliance with the imposing entity, pursuant to Rule 60(a)(5), Arizona Rules of the Supreme Court. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than thirty days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend appropriate action and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden

of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

4. Respondent must pay the restitution set forth in the Restitution section of this document.

5. Respondent must pay all costs incurred by the State Bar in connection with these proceedings.

DATED this 24 day of November, 2006.


Mark S. Sifferman
Hearing Officer 9J

COPY of the foregoing mailed this
24 day of November, 2006, to:

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